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OFFICE OF PETITIONS

In re Patent of Timans et al. :
Patent No. 7,579,440 :
Issue Date: August 25, 2009 :
Application No. 10/777,790 :
Filing Date: February 11, 2004 :
Attorney Docket No. DX01040K3B :

**DECISION ON REQUEST FOR
CERTIFICATE OF CORRECTION**

This letter is in response to the “REQUEST FOR CERTIFICATE OF CORRECTION PURSUANT TO 35 U.S.C. §254” filed May 14, 2010, requesting correction of the patent term adjustment indicated in the patent. Patentees request the patent term adjustment read “834 days” instead of “858 days.”

The request is **DISMISSED**.

Patentee is given **THIRTY (30) DAYS** to respond to this decision. Extensions of time will NOT be granted under 37 C.F.R. § 1.136(a).

The patent issued on August 25, 2009. The patent indicated the patent term adjustment was 579 days. A “Request for Recalculation of Patent Term Adjustment in View of Wyeth” was filed February 5, 2010. On April 20, 2010, the Office mailed a decision responding to the February 5, 2010 request. The decision stated a certificate of correction would be issued indicating the patent term adjustment is 858 days. The instant request for reconsideration was filed May 14, 2010.

During July 2010, the Office issued a notice in the federal register clarifying when the Office will change the patent term adjustment for a patent via issuance of a certificate of correction.¹ The Notice states,

The USPTO ... has determined that it is not appropriate to provide a patent term adjustment recalculation via a certificate of correction under 35 U.S.C. 254 or 255. A

¹ *Treatment of Letters Stating That the USPTO’s Patent Term Adjustment Determination is Greater Than What the Applicant or Patentee Believes is Appropriate*, 75 Fed. Reg. 42079 (July 20, 2010).

certificate of correction is permissible under 35 U.S.C. 254 only for a mistake in a patent that “is clearly disclosed by the records of the Office.” *See* 35 U.S.C. 254. While the applicable patent term adjustment is ascertainable from the records of the USPTO, a revised patent term adjustment determination requires a complex calculation that is not “clearly disclosed” by the records of the USPTO. In addition, a certificate of correction is permissible under 35 U.S.C. 255 only for “a mistake of a clerical or typographical nature, or of minor character.” *See* 35 U.S.C. 255.

Thus, the USPTO has long maintained that a request for a certificate of correction under either 35 U.S.C. 254 or 255 is not an appropriate venue for seeking a change to the patent term adjustment indicated on the patent....

[I]t is not appropriate to issue a certificate of correction under 35 U.S.C. 254 or 255 to revise the patent term adjustment indicated in the patent unless it is being revised for consistency with: (1) The patent term adjustment determined via a decision on a request for reconsideration under 37 CFR 1.705; or (2) the total patent term adjustment indicated on the Patent Application Information Retrieval (PAIR) screen that displays the patent term adjustment for the patent....

[T]he USPTO will not grant a request for a certificate of correction ... to revise the patent term adjustment indicated in the patent, except in the two situations discussed previously.²

Even if the number of days of patent term adjustment on a requested certificate of correction is less than the number of days listed on a patent, a certificate of correction will not be issued if one of the previously identified exceptions do not exist. As stated by the Office, with emphasis added,

If the applicant or patentee wants the USPTO to reconsider its patent term adjustment determination, the applicant must use the procedures set forth in 37 CFR 1.705 for requesting reconsideration of the patent term adjustment determination, whether the USPTO’s patent term adjustment determination is greater or less than the adjustment that the applicant believes to be appropriate.³

Neither of the two exceptions discussed in the previously quoted language apply in this case. Therefore, the request for a certificate of correction listing a patent term adjustment of 834 days is dismissed.

The Certificates of Correction Branch will be informed of the instant decision and will issue a certificate of correction listing a patent term adjustment of 858 days pursuant to the decision mailed April 20, 2010.

² Id. at 42079-42080.

³ Id. at 42080.

Telephone inquiries specific to this decision should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.



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